

NOT FOR PUBLICATION. FOR UPLOAD
IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF SAINT CROIX

PAUL K. SMITH,

Plaintiff,

Civ. No. 1995-28

v.

TRANSDUCER TECHNOLOGY, INC.
ENDEVCO CORPORATION and
MEGGITT-USA, INC.,

Defendants.

ORDER ON PLAINTIFF'S RENEWED MOTION TO COMPEL

THIS MATTER came for consideration on Plaintiff's Renewed Motion to Compel (filed on October 16, 2000). Defendants filed opposition to the motion and plaintiff filed a Response to such opposition.

Plaintiff's motion (and the opposition thereto), represent another chapter in the tortuous history of expert witness discovery in this overly contentious case.

By Order dated July 19, 2000, the Court allowed plaintiff further discovery with regard to any documents produceable pursuant to Fed.R.Civ.P. 26(a)(2)(B) and held that plaintiff is entitled to discovery of facts presented by defendants' attorneys to defendants' expert witnesses. Such Order, which was not appealed, is incorporated herein by reference. By Order Dated September 1, 2000, the Court ordered that any motion requesting further production from defendants' expert witness may only be directed to such July 19, 2000 Order and defendants'

purported compliance therewith.¹

In this motion the plaintiff seeks production of:

1. All correspondence between defendants' expert witnesses and Attorney Triesman;
2. All rough drafts of experts reports or drafts that are different from the final reports (with any claims of privilege to be decided by the Court further to *in camera* review);
3. Regarding Carmelo Rivera:
 - a. Long distance telephone bills to show the amount of phone calls with counsel before finalization of his report;
 - b. The documents reviewed including:
 - (i) plaintiff's personnel file
 - (ii) job application;
 - (iii) performance appraisals;
 - (iv) notes regarding his promotions;
 - (v) Rivera's job analysis;
 - (vi) plaintiff's job evaluations;
 - (vii) Rivera's notes from conversations with TTI and Atty Triesman.

¹On August 7, 2000, defendants filed a "Notice of Compliance with Disclosure Obligations of July 19, 2000 Order" dated August 2, 2000.

4. Regarding Dr. Schindell:
 - a. His tests, test data, test results;
 - b. Notes from the interview with plaintiff;
 - c. All documents in his “clinical file” and “non clinical file”;
 - d. His bills connected with the case;
 - e. The information received from a benefits evaluator;
 - f. The documents reviewed regarding plaintiff from Dartmouth;
 - g. TTI employment records;
 - h. That Dr. Schindell be directed to answer questions regarding the subject matter and substance of his conversations with Attorney Trieshman.
5. Regarding Joseph Sarjeant:
 - a. The information he sent to Attorney Trieshman as to his qualifications including any brochures;
 - b. The census data he reviewed;
 - c. The affirmative action plans he reviewed;
 - d. The backup invoice for Invoice 4750;
 - e. The regression analysis;
 - f. The salary information received from Ms. Infield.

In their opposition to this motion defendants assert that:

1. In their August 2, 2000, Notice of Compliance defendants demonstrated that they had either produced or offered to produce all documents required to be disclosed under Rule 26(a)(2)(B);
2. Defendants need not produce correspondence between their attorney and their expert witnesses because (per defendants) the expert witnesses did not use any information or data in letters from defendants' attorney in forming their opinions (with affidavits to such effect attached);
3. Rule 26(a)(2)(B) does not require the automatic disclosure of prior drafts of reports, transmittal letters or long distance telephone bills;
4. Plaintiff's motion is out of time.

Because plaintiff's motion is in conformity with the September 1, 2000 Order referenced above, the court rejects defendants' argument that plaintiff's motion is untimely.

In the Order dated August 19, 2000, the court held that "where documents considered by defendants' experts contain both facts and legal theories of the attorney, plaintiff is entitled only to discovery of the facts . . . where such combinations exist it will be necessary to redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-

expert dialectic’”, *citing Bogosian v. Gulf Oil Corp. et al.*, 738 F.2d 587, 595 (3d Cir. 1984). This principle was reaffirmed in *Krisa v. Equitable Life Assurance Society*, 2000 WL 1371332, * 7 (M.D. Pa. May 31, 2000). That case also held that draft reports of testifying expert witnesses are discoverable. *Id.* at * 3-4. See also, *Occulto v. Adama of New Jersey, Inc.*, 125 F.R.D. 611, 616 (D.N.J. 1989).

Plaintiff’s request that Dr. Schindell be directed to answer questions at depositions regarding his conversation with Attorney Triesman is more problematic in that such examination does not readily allow prior *in camera* review as the court may order with regard to production matter. In *Haworth v. Herman Miller Inc.*, 162 F.R.D. 289, 296 (W.D. Mich. 1995), the court considered such deposition testimony and held that some questions regarding discussions between the expert and his counsel about the expert’s report are discoverable, stating,

“Whether a question is improper depends on the question. If the question regards mechanical advice on the preparation of the expert report, the question is not objectionable. See Advisory Committee Notes, 1993 Amendment. If the question asks whether certain facts had not been provided the expert for his consideration, the question would be proper as well. Opposing counsel may test whether the witness’ report accurately reflects all the facts actually considered. Opinion work product protection is not triggered unless “disclosure creates a real, non-speculative danger of revealing the lawyer’s mental impressions” and the attorney had “a justifiable expectation that the mental impressions revealed by the materials will remain private.”

Upon consideration it is **ORDERED AS FOLLOWS:**

1. In General

All production ordered herein must be made within fifteen (15) days of date of this Order. To the extent defendants maintain that any documents

ordered to be produced have already been produced to plaintiff, defendants must so respond by averrment and they must then specify the particular documents produced and the particular time and manner of production thereof (See, e.g., *Martin v. Easton Publishing Co. et al.*, 85 F.R.D. 312, 315 (E.D. Pa. 1980).

To the extent defendants maintain that any documents ordered to be produced do not exist (e.g., Rivera's notes of conversations with defendants' attorney) defendants must so aver.

If within five (5) days of service of defendants' responses plaintiff serves and files an averred statement that disputes receipt of documents that defendants claim were previously produced, defendants shall then re-produce such documents with all costs thereof to be paid by plaintiff.

2. Correspondence Between Defendants' Attorney and Expert Witnesses.

Defendants shall produce copies of all correspondence by and between its attorneys and its expert witnesses with regard to this case. To the extent defendants' correspondence contains "core work product"² they may redact such matter from the documents produced. In all such cases defendants shall then provide a copy of such expurgated responses together with the unexpurgated documents for *in camera* review by the court. *Bogosian*, 738 F.2d at 595-96.

²See *Bogosian*, 738 F.2d at 593 defining core work product as the attorney's mental impressions and thought processes relating to the legal theories of a complex case.

3. Drafts of Expert Reports

Defendants shall produce copies of all draft reports and all reports of their expert witnesses (intended to testify) that are different from the final reports submitted. *Krisa*, 2000 WL 1371332 at *4; *Occulto*, 125 F.R.D. at 616. If defendants claim any “core work product” privilege therein they must proceed as set out in paragraph 2, above.

4. Re Carmelo Rivera

Defendants shall produce the following:

- a. Plaintiff’s personnel file;
- b. Plaintiff’s job application;
- c. Plaintiff’s performance appraisals;
- d. Notes regarding plaintiff’s promotions;
- e. Rivera’s job analysis;
- f. Rivera’s notes from any conversations with TTI and Atty Triesman.

Defendants need not produce Rivera’s telephone bills. Rivera testified at deposition that he reviewed whatever performance evaluations were in the file and that he did not make a notation of the specific ones. Accordingly, no further production with regard thereto is required.

5. Re Dr. Schindell:

- A. Defendants shall produce the following:

1. His bills connected with the case;
2. The documents received by him (regarding plaintiff) from
Dartmouth;
3. TTI employment records.

Upon delivery of a request therefor from Dr. Copemann and a release therefor from plaintiff, defendants shall produce (to Dr. Copemann) Dr. Schindell's tests, test data, test results, and notes from the interview with plaintiff.

Defendants need not produce all documents in Dr. Schindell's "non clinical file" nor the information received from a benefits evaluator.

- B. Dr. Schindell shall respond to deposition questions concerning his conversations with Attorney Triesman subject, however, to the limitations noted above concerning correspondence between defendants' attorney and expert witnesses. If defendants intend to assert that any portion of any such conversation is afforded such protection they may submit a statement of Dr. Schindell's proposed testimony for *in camera* review. (Denoting the claimed protected portion).

6. Re Joseph Sarjeant

Defendants shall produce the following:

- a. The information sent to Attorney Triesman concerning his

qualifications including any brochures;

- b. The census data he reviewed;
- c. The affirmative action plans he reviewed;
- d. The backup data for Invoice 4750;
- e. The "cohort analysis" or "regression analysis".

Defendants need not produce the Infield salary information.

Dated: November 2, 2000 ENTER:

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:
Orinn F. Arnold, Clerk of Court
by: _____
Deputy Clerk

cc: Lee J. Rohn, Esq.
George Logan, Esq.
Adrianne Dudley, Esq. (FAX 776-8044)